Rema bt Simban v Bujang bin Juhaili & Anor

HIGH COURT (BINTULU) — SUIT NO BTU-22–3 OF 2011
JOHN KO WAI SENG JC
5 JULY 2012

Civil Procedure — Disposal of case on point of law — Disposal of action without trial — Issue of which court had jurisdiction to decide on plaintiff's claim as beneficiary of estate of deceased Muslim — Whether case suitable for being dealt with summarily — Whether issue raised was question of law that would determine suit — Striking out — Whether plaintiff's claim should be struck off for not disclosing reasonable cause of action — Rules of the High Court 1980 O 14A, O 18 r 19 & O 92 r 4

Civil Procedure — Jurisdiction — Conflict of jurisdiction between High Court and Shariah Court — Plaintiff's claim to estate of deceased Muslim — Whether High Court had jurisdiction to hear and determine plaintiff's claim — Whether case was removed from jurisdiction of Shariah Court because plaintiff prayed for remedy of declarations — Federal Constitution art 121(1A) — Syariah Courts Ordinance (Laws of Sarawak) 2001 s 103(b)(vii) & (ix)

Civil Procedure — Locus standi — Action by beneficiary seeking share in estate of deceased Muslim — Whether plaintiff had locus standi to institute action against duly appointed administrator and chargee of land from estate — Whether plaintiff by not being beneficiary recognised by Shariah law would lose her locus standi to sue defendants for rest of reliefs prayed for — Whether plaintiff's claim should be struck off for not disclosing reasonable cause of action

When Simban bin Endang ('the deceased'), a Muslim, died intestate, the first defendant, who was also a Muslim, applied for and obtained the grant of the letters of administration in respect of the estate of the deceased ('the estate'). The estate comprised, inter alia, of two lots of land situated in Sungai Selezu, Sebuah ('the lands'), which the first defendant as its duly appointed administrator transferred to himself. The first defendant then charged the lands ('the charges') to the second defendant as security for monies he borrowed from the second defendant. The plaintiff, a Muslim who claimed to be a beneficiary of the estate, alleged that she was entitled to inherit the lands. In the meantime the state government compulsorily acquired some of the lands with compensation paid to the first defendant. The plaintiff, in her capacity as beneficiary of the estate, filed a suit against the defendants wherein she sought,

inter alia, a declaration that the first defendant held the lands in trust for her as a beneficiary of the deceased's estate; a declaration that the charges were null and void; an order for distribution of the estate in accordance with Islamic Muslim law of inheritance; and an account of the government compensation received by the first defendant when some of the lands were compulsorily acquired. In his defence the first defendant disputed and denied that the plaintiff was the heir and beneficiary of the deceased's estate and also challenged the jurisdiction of this court to determine any issues arising from Islamic law such as the plaintiff's claim to the estate. The second defendant pleaded that it was not a party or privy to any misconduct by the first defendant in administering the estate. By way of the present O 14A application, the defendants applied to strike out the plaintiff's suit under O 18 r 19(1) and O 92 r 4 of the Rules of the High Court 1980 ('RHC'). The defendants contended that it was an abuse of process for the plaintiff to file this action on the grounds that the subject matter in issue, which was a claim for distribution of the estate of a Muslim in accordance with the Muslim law of inheritance, was within the jurisdiction of the Shariah High Court and not suitable for determination by this court. The defendants also submitted that this issue was a question of law that was suitable for determination by this court pursuant to O 14A of the RHC without full trial of this action. The plaintiff maintained that it was this court and not the Shariah Court that had the jurisdiction to hear the present case.

Held, striking out the plaintiff's action with costs:

(1) The issue that arose in the present case, which was the question of law as to which court had the jurisdiction to decide on the plaintiff's claim as beneficiary, was a matter that would determine this suit. Thus, after having considered the undisputed facts and the issue of law it was found that the present suit was suitable for being dealt with summarily under O 14A of the RHC (see para 24).

(2) Article 121(1A) of the Federal Constitution has clearly provided that this court shall have no jurisdiction in respect of any matter within the jurisdiction of the Shariah Courts. It was also clear that s 103(b)(vii) and (ix) of the Syariah Courts Ordinance (Laws of Sarawak) conferred the Shariah High Court of Sarawak with the express jurisdiction to hear and determine actions relating to the division, inheritance and entitlement of a beneficiary in the estate of a deceased Muslim. Thus, the issue as to whether the plaintiff was a beneficiary of the estate and her share of the estate were matters that were not within the purview of this court. These were matters that had to be submitted for the adjudication of the Shariah High Court of Sarawak (see paras 28, 30–31).

(3) Further, this court was bound by the decision of the Federal Court in *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily*

bin Shaik Natar & Ors [2003] 3 MLJ 705*(Shaik Zolkaffily*'s case). Applying the 'subject matter' approach taken by the court in *Shaik Zolkaffily*'s case to the present case it was found that the present case was not removed from the jurisdiction of the Syariah Court merely because the plaintiff had prayed for the remedy of declarations. Since the fact that the plaintiff was seeking declaratory reliefs did not oust the Syariah High Court's jurisdiction, this part of her claim for reliefs ought to be struck out from this suit under O 18 r 19 and O 92 r 4 of the RHC (see paras 35–36 & 38).

(4) At the same time, the rest of the reliefs prayed for by the plaintiff against the defendants, such as the declarations for administration of the estate, setting aside the charges and accountability for monies received, were matters that fell squarely within the jurisdiction of this court. However, in the order of things, until such time when the plaintiff could establish herself as a beneficiary before the Shariah High Court, this court had no jurisdiction to entertain her claim against the defendants. In the circumstances, the plaintiff was not a beneficiary of the estate recognised by Shariah law and would lose her locus standi to sue the defendants for the rest of the reliefs prayed for in this suit. Thus, the plaintiff's suit, which was found not to disclose a reasonable cause of action, should be struck out under O 18 r 19(1)(a) of the RHC. The present suit also became an abuse of process and ought to be struck out under the inherent jurisdiction of the court pursuant to O 92 r 4 of the RHC (see paras 39, 46, 48 & 50).

[Bahasa Malaysia summary

Apabila Simban bin Endang ('si mati'), seorang Muslim, meninggal dunia tanpa wasiat, defendan pertama, yang juga seorang Muslim, telah memohon untuk dan memperoleh pemberian surat-surat pentadbiran berkaitan harta pusaka si mati ('harta pusaka tersebut'). Harta pusaka tersebut terdiri daripada, antara lain, dua lot tanah yang terletak di Sungai Selezu, Sebuah ('tanah-tanah tersebut'), yang mana defendan pertama sebagai pentadbir yang dilantik telah memindah milik kepada dirinya sendiri. Defendan pertama kemudian telah menggadaikan tanah-tanah tersebut ('gadaian-gadaian tersebut') kepada defendan kedua sebagai cagaran untuk wang yang dipinjam daripada defendan kedua. Plaintif, seorang Muslim yang mendakwa benefisiari kepada harta pusaka tersebut, mengatakan bahawa dia berhak untuk mewarisi tanah-tanah tersebut. Sementara itu kerajaan negeri mewajibkan pemerolehan beberapa tanah tersebut dengan pampasan dibayar kepada defendan pertama. Plaintif, dalam kapasitinya sebagai benefisiari harta pusaka tersebut, telah memfailkan guaman terhadap defendan-defendan tersebut yang mana dia memohon, antara lain, deklarasi bahawa defendan pertama memegang tanah-tanah tersebut dalam amanah untuknya sebagai benefisiari kepada harta pusaka si mati; deklarasi bahawa cagaran-cagaran tersebut adalah terbatal dan tidak sah;

perintah untuk pembahagian harta pusaka tersebut menurut undang-undang pewarisan Islam; dan akaun pampasan kerajaan yang diterima oleh defendan pertam apabila beberapa tanah tersebut diperoleh secara wajib. Dalam pembelaannya defendan pertama telah mempertikai dan menafikan bahawa plaintif adalah waris dan benefisiari harta pusaka si mati dan juga mencabar bidang kuasa mahkamah ini untuk menentukan apa-apa isu yang timbul daripada undang-undang Islam seperti yang dituntut plaintif terhadap harta pusaka tersebut. Defendan kedua memplid bahawa ia bukan pihak atau privi kepada apa-apa salah laku oleh defendan pertama dalam mentadbir harta pusaka tersebut. Melaui permohonan A 14A ini, defendan-defendan memohon untuk membatalkan guaman plaintif di bawah A 18 k 19(1) dan A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Defendan-defendan berhujah bahawa ia adalah satu penyalahgunaan proses bagi plaintif memfailkan tindakan ini atas alasan bahawa perkara pokok yang menjadi isu, iaitu tuntutan untuk pembahagian harta pusaka seorang Muslim menurut undang-undang pewarisan Islam, adalah dalam bidang kuasa Mahkamah Tinggi Syariah dan tidak sesuai untuk diputuskan oleh mahkamah ini. Defendan-defendan juga berhujah bahawa isu ini adalah persoalan undang-undang yang sesuai untuk ditentukan oleh mahkamah ini menurut A 14A KMT tanpa perbicaraan penuh tindakan ini. Plaintif menegaskan bahawa adalah untuk mahkamah ini dan bukan Mahkamah Syariah yang mempunyai bidang kuasa untuk mendengar kes ini.

Diputuskan, membatalkan tindakan plaintif dengan kos:

(1) Isu yang timbul dalam tindakan ini, yang merupakan persoalan undang-undang berhubung mahkamah manakah yang mempunyai bidang kuasa untuk memutuskan tuntutan plaintif sebagai benefisiari, adalah perkara yang akan menentukan guaman ini. Oleh itu, setelah mengambil kira fakta-fakta dan isu undang-undang yang tidak dipertikaikan adalah didapati bahawa guaman ini sesuai untuk dikendalikan secara terus di bawah A 14A KMT (lihat perenggan 24).

(2) Perkara 121(1A) Perlembagaan Persekutuan jelas memperuntukkan bahawa mahkamah ini tidak mempunyai apa-apa bidang kuasa berkaitan apa-apa perkara dalam bidang kuasa Mahkamah Syariah. Adalah juga jelas bahawa s 103(b)(vii) dan (ix) Ordinan Mahkamah Syariah (Undang-Undang Sarawak) memberikan Mahkamah Tinggi Syariah Sarawak bidang kuasa yang nyata untuk mendengar dan menentukan tindakan-tindakan berkaitan pembahagian, pewarisan dan pemberian hak milik benefisiari dalam harta pusaka seorang Muslim yang telah meninggal dunia. Oleh itu, isu sama ada plaintif adalah benefisiari harta pusaka tersebut dan bahagiannya dalam harta pusaka tersebut adalah perkara-perkara yang bukan dalam bidang kuasa mahkamah ini. Perkara-perkara tersebut perlu dikemukakan untuk pengadilan Mahkamah Tinggi Syariah Sarawak (lihat perenggan 28, 30–31).

(3) Tambahan pula, mahkamah ini terikat dengan keputusan Mahkamah Persekutuan dalam kes *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705('kes *Shaik Zolkaffily*'). Dengan menggunapakai pendekatan 'subject matter' yang diambil oleh mahkamah tersebut dalam kes *Shaik Zolkaffily* untuk kes ini adalah didapati bahawa kes ini tidak dibuang daripada bidang kuasa Mahkamah Syariah hanya kerana plaintif telah memohon untuk remedi deklarasi-deklarasi tersebut. Oleh kerana fakta bahawa plaintif memohon relief-relief deklarasi tersebut tidak menyingkir bidang kuasa Mahkamah Tinggi Syariah, bahagian tuntutannya ini untuk relief-relief patut dibatalkan daripada guaman ini di bawah A 18 k 19 dan A 92 k 4 KMT (lihat perenggan 35– 36 & 38).

(4) Pada masa sama, relief-relief lain yang dipohon oleh plaintif terhadap defendan-defendan tersebut, seperti deklarasi-deklarasi untuk pentadbiran harta pusaka tersebut, mengetepikan cagaran-cagaran tersebut dan kebertanggungjawaban untuk wang yang diterima, merupakan perkara-perkara yang terangkum dalam bidang kuasa mahkamah ini. Walau bagaimanapun, bagi tujuan perkara-perkara sedemikian, sehingga plaintif berjaya membuktikan dirinya sebagai benefisiari di hadapan Mahkamah Tinggi Syariah, mahkamah ini tiada bidang kuasa untuk mendengar tuntutannya terhadap defendan-defendan tersebut. Dalam keadaan ini, plaintif bukan benefisiari harta pusaka tersebut yang diiktiraf oleh undang-undang Syariah dan akan hilang locus standinya menyaman defendan-defendan untuk relief-relief yang dipohon dalam guaman ini. Oleh itu, guaman plaintif, yang didapati tidak menunjukkan kausa tindakan munasabah, patut dibatalkan di bawah A 18 k 19(1)(a) KMT. Guaman ini juga menjadi satu penyalahgunaan proses dan patut dibatalkan di bawah bidang kuasa sedia ada mahkamah menurut A 92 k 4 KMT (lihat perenggan 39, 46, 48 & 50).]

Notes

For a case on action disposed of without trial, see 2(1) *Mallal's Digest* (4th Ed, 2012) para 2964.

For cases on conflict of juridiction between the High Court and Shariah Court, see 2(1) *Mallal's Digest* (4th Ed, 2012) paras 5162–5165.

Cases referred to

Abdul Shaik bin Md Ibrahim & Anor v Hussein Ibrahim & Ors [1999] 5 MLJ 618; [1999] 3 CLJ 539, HC (refd)

Barkath Ali bin Abu Backer v Anwar Kabir bin Abu Backer [1997] 4 MLJ 389, HC (refd)

Bato Bagi & Ors v Government of the State of Sarawak [2011] 6 CLJ 387, CA (refd)

Daud bin Mamat & Ors v Majlis Agama Islam & Anor [2001] 2 MLJ 390; [2001] 2 CLJ 161, HC (folld)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2008] 2 MLJ 812; [2007] 6 CLJ 741, CA (refd)
Kaliammal a/p Sinnasamy v Majlis Agama Islam Wilayah Persekutuan (Jawi) & Ors [2012] 3 MLJ 694; [2011] 2 CLJ 165, CA (refd)
Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor [2007] 5 MLJ 101; [2007] 5 CLJ 253, FC (refd)
Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang dan satu tindakan lain [1996] MLJU 500; [1996] 3 CLJ 231, HC (refd)
Majlis Agama Islam Pulau Pinang v Isa Abdul Rahman & Satu Yang Lain [1992] 2 MLJ 244; [1992] 1 CLJ (Rep) 201, SC (refd)
Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily Shaik Natar & Ors [2003] 3 MLJ 705; [2003] 3 CLJ 289, FC (folld)
Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8; [2003] 4 CLJ 337, CA (refd)
Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor [1999] 1 MLJ 489; [1999] 2 CLJ 5, FC (folld)

Legislation referred to

Federal Constitution art 121(1),(1)(b), (1A)
Rules of the High Court 1980 O 14A, O 18 r 19, 19(1)(a), O 92 r 4
Sarawak Shariah Courts Ordinance 2001 s 10(3)(b), (3)(b)(vii), (ix)

Satinder Singh Sandhu (Sandhu & Co) for the plaintiff.
Wong Woan Sii (Ling & Wong Advocates) for the defendants.

John Ko Wai Seng JC:

RULING

APPLICATION

[1] The defendants are applying for striking out under O 14A, O 18 r 19(1) and O 92 r 4 of the RHC 1980 of the plaintiff's suit. The plaintiff, a Muslim is claiming by this suit in this court for an inheritance and administration of the estate of a deceased who is a Muslim. The estate is being administered by the first defendant, another Muslim under letters of administration for an intestate granted under civil law. The rest of the reliefs being claimed in this suit include those against a non-Muslim, the second defendant who had taken charges on the two parcels of land of the estate.

[2] The defendants pose this question of law under O 14A of the RHC 1980 for the court's decision:

Whether the matters in issue are within the jurisdiction of this honourable court.

Upon reading:

(a) re-amended writ of summons and statement of claim;

(b) the second defendant's defence;

(c) the first defendant's defence;

(d) reply to the first defendant's defence;

(e) the defendants' summons in chambers dated 28 February 2012 ('application');

(f) the first defendant's affidavit in support affirmed on 28 February 2012 ('support affidavit 1');

(g) the second defendant's affidavit in support affirmed on 28 February 2012 ('support affidavit 2'); and

(h) the plaintiff's affidavit in opposition affirmed on 16 March 2012 (opposing affidavit;

and upon reading:

(a) the defendants' submission;

(b) the plaintiff's submission; and

(c) the defendants' reply submission;

the court finds as follows:

THE FACTS OF CASE

[3] The late Simban b Endang ('deceased') who had died intestate in August 1959 was a Muslim before and up to his death.

[4] The estate of the deceased ('estate') comprised, inter alia, of:

(a) Lot 801 Block 8 Selezu Land District with an area of 2.85500 hectares more or less and situate at Sungai Selezu, Sebuah; and

(b) Lot 803 Block 8 Selezu Land District with an area of 4,860 square metres more or less and situate at Sungai Selezu, Sebuah.

(Individually, 'Lot 801' and 'Lot 803' collectively the 'lands')

[5] The plaintiff who is also a Muslim claims to be the heir and beneficiary of the estate and as beneficiary is claiming to be entitled to inherit the lands from the estate.

[6] The first defendant another Muslim also claims to have rights to inherit from the estate had been appointed as the administrator of the estate by obtaining the grant of the letters of administration from the probate office on the 5 August 2009.

[7] The first defendant had then transferred the lands to himself vide application for transmission instrument NL308/2009 at the Bintulu Land Registry Office on 23 November 2009.

[8] The first defendant had in early 2010 charged the lands to the second defendant vide memoranda of charge instruments Nos L308/2010 and L1423/2010 to secure sums for his own benefit and use 86 ('charges).

[9] In 17 August 2010, 219.5 square metres of Lot 801 was compulsorily acquired and resumed vide instrument No L4181/2010 by the State Government with compensation paid to the first defendant.

THE PLAINTIFF'S SUIT

[10] From the indorsement of claim in this suit, this is the relevant summary of what the plaintiff had sought from this court in para 13 of the re-amended statement of claim:

against the defendants:

(a) a declaration that lands form part of the estate;

(b) a declaration that the first defendant holds the lands in trust for the plaintiff as beneficiaries of the estate;

(c) a declaration that charge on Lot 803 is null and void; and

(d) a declaration that charge on Lot 803 is null and void;

against the first defendant:

(a) an order for distribution of the estate… in accordance with Islamic Muslim law of inheritance …;

(b) an account for government compensation from Lot 801;

(c) an account of monies received from the charges;

(d) an order for payment … of the estate… in accordance with Islamic Muslim law of inheritance …; and

(e) all other necessary accounts and direction; …

THE FIRST DEFENDANT'S DEFENCE

[11] The first defendant's defence was filed without prejudice to the pending application to strike out the action.

[12] By para 1 of his defence, the first defendant disputes and denies that the plaintiff is the heir and beneficiary of the estate.

[13] By para 11 of his defence, the first defendant challenges the jurisdiction of this court on any matter or issue arising from Islamic law including any claim or inheritance from the estate by the plaintiff.

THE SECOND DEFENDANT'S DEFENCE

[14] The second defendant's defence is that it is not a party or privy to any alleged incident of misconduct of the first defendant in administering the estate.

[15] Further the second defendant claimed to have acted in good faith in its ordinary course of business as a bona fide lender for consideration and without notice of any breach in dealing with the first defendant in the creation of the charges on the lands.

THE SUITABILITY OF O 14A

[16] The defendants contend as the ground for the application that the subject matter in issue being the a claim for a Muslim inheritance and administration of the estate of a Muslim is within the jurisdiction of the Shariah High Court, and this court has no jurisdiction by virtue of art 121(1A) of the Federal Constitution read with s 10(3)(b) of the Sarawak Syariah Courts Ordinance 2001, and hence it is an abuse of process for the plaintiff to file this action.

[17] Learned counsel for the defendants submitted that this issue is a question of law which is suitable for determination by this court pursuant to O 14A of the RHC 1980 without the full trial of the action and the determination of such question will finally determine the entire cause or matter or any claim or issue therein.

[18] Learned counsel for the plaintiff submitted that there are serious dispute of facts and/or no sufficient agreement of facts, making this case unsuitable for determination via an O 14A procedure and reiterated that the court, and not the Shariah Court, has jurisdiction to hear the case.

[19] Order 14A of the RHC 1980 reads:

> (1) The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that:
>
> (a) such question is suitable for determination without the full trial of the action; and
>
> (b) such determination will finally determine the entire cause or matter or any claim or issue therein.
>
> (2) Upon such determination the court may dismiss the cause or matter or make such order or judgment as it thinks just.

[20] In *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8; [2003] 4 CLJ 337 Mohd Noor Ahmad JCA observed that (p 19 (MLJ); p 351a (CLJ)):

> In a nutshell, the order enables the court to determine any question of law or construction of document where it appears to the court that such question is suitable for determination without the full trial of the action and such determination will finally determine the entire cause or matter or any claim or issue therein.

[21] Mohd Noor Ahmad JCA later added (*ibid* p 31 (MLJ); p 364h (CLJ)):

> In our view, even if the case appears to be or is complicated it does not mean that the court must shun away from considering the applicability of O 14A and O 33 r 2 in relation to the questions of law posed which are clear and definite and the issues are clear cut. Real and serious attempt must be made to identify the material facts pleaded which are obviously undisputed or which should not have been disputed and then to apply the relevant rule to the facts as found. There are authorities in support of the proposition that merely because an issue of law takes a little longer to if determine does not mean that the court should refuse the application (see *Korso Finance Establishment Anstalt v John Wedge*,).

[22] See also *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2008] 2 MLJ 812; [2007] 6 CLJ 741 at paras 132 and 135 p 849 (MLJ); 130 and 134 p 783 (CLJ) on the usage of facts from the affidavits filed to support the questions of law to be determined by the court.

[23] In *Bato Bagi & Ors v Government of the State of Sarawak* [2011] 6 CLJ 387, Sulaiman Daud JCA had observed this (at para 17):

It is well settled that an issue is only suitable for determination under O 14A if the points of law to be determined thereunder have been stated in clear and precise terms, and the facts disclosed by the pleadings and affidavit evidence are sufficient for the court to make such determination which would be final as to the entire cause or matter, (see *Allen v Gulf Oil Refining Ltd* [1980] QB 156, and *Seloga Jaya Sdn Bhd v (JEM Genisys Sdn Bhd* [2008] 2 CLJ 686).

[24] The court having considered the undisputed facts and the issue of law raised on jurisdiction of the courts agrees with learned counsel for the defendants that the matter is suitable for being dealt with summarily under O 14A of the RHC 1980 as a decision on the question of law as to which court has jurisdiction to decide on the claim of the plaintiff as a beneficiary will determine this suit.

THE JURISDICTION OVER MUSLIM ESTATE DISPUTES

[25] Learned counsel for the defendants submitted that disputes over Muslim estates in Sarawak are within the jurisdiction of the Shariah High Court, and that this court has no jurisdiction.

[26] Learned counsel for the plaintiff on the other hand submitted that since the estate is already under civil law administration, the plaintiff is applying to this court by her declarations to bring back the lands unencumbered which affects a non-Muslim and money into the estate first and with the rest of the reliefs which only this court can give and thereafter she would apply to the Shariah Court for the actual distribution in accordance with Muslim law.

[27] The court will now ascertain the respective jurisdiction of this court and the Shariah High Court of Sarawak on the relevant issues raised in this suit for decision and relief.

The law: Administration of the deceased's estate

[28] The court will refer to the relevant law governing the administration of deceased Muslim estates:

(a) Article 121(1) and (1A) of the Federal Constitution
Article 121(1)(b) and (1A) of the Federal Constitution has provided:

> 21. Judicial Power of Federation
>
> (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —
>
> (a) one in the States of Malaya, …; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Courts in Sabah and Sarawak …; A

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

On the effect of art 121(1A)), Suriyadi Halim Omar J (as he then was) in *Daud bin Mamat & Ors v Majlis Agama Islam & Anor* [2001] 2 MLJ 390; [2001] 2 CLJ 161 casecit stated (at p 397–398 (MLJ); p 166i–167d (CLJ)): B

Come A 704 of 1988, effective on 10 June 1988, the promulgation of art 121(1A) of the Federal Constitution, ousted the High Courts in Malaya and Sabah and Sarawak, over matters which fall within the jurisdiction of the Shariah Courts. There is no shortage of cases that have acquiesced to this provision, among them *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1; [1991] 3 CLJ 2768; [1991] 1 CLJ 77 (Rep). Under List 11-State List (art 74; 95B(1)(a)), of the Federal Constitution has succinctly delineated the powers of the Shariah Court, in short over persons professing the religion of Islam. The Supreme Court in *Mohamed Habibullah Mahmood v Faridah Dato' Talib* [1992] 2 MLJ 793; [1993] 1 CLJ 264 clearly established that: C D

The intention of Parliament by art 121(1A) of the Federal Constitution is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Shariah Court. E

The legislation of art 4 of the Constitution, which entrenches the supreme position of the Federal Constitution, merely reconfirmed the lofty position of the above art 121(1A). With the latter article in existence any jurisdictional conflicts, once and for all, between the civil and the Shariah Courts is avoided. Taking the matter a step further and from a different perspective, the religious court's power, in the same vein similarly cannot be invoked against non-Muslims (see *Ng Siew Pian v Abd Wahid Abu Hassan, Kadi Daerah Bukit Mertajam & Anor* [1992] 2 MLJ 425; [1993] 1 CLJ 391). F G

It is clear that from art 121(1A) of the Federal Constitution that this court shall have no jurisdiction in respect of any matter within the jurisdiction of the Shariah Courts. The court will take cognisance of what Hashim Yeop Sani CJ (Malaya) opined in *Dalip Kaur*'s case: H

The new cl 1A of art 121 of the Constitution effective from 10 June 1988 has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Shariah Courts. But that clause does not take away the jurisdiction of the civil court to interpret any written laws of the states enacted for the administration of Muslim law. I

The court stands guided by the case of *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor* [1999] 1 MLJ 489; [1999] 2 CLJ 5, where Mohamed Dzaiddin FCJ, as he then was, in the Federal Court had observed (at p 502 (MLJ); p 22f–g (CLJ)):

> Whilst we agree with the approach adopted by Abdul Hamid J following Habibullah, that when there is a challenge to jurisdiction the correct approach is to look at the State Enactments to see whether or not the Shariah courts have been expressly conferred jurisdiction on a given matter, …

This was reiterated in *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101; [2007] 5 CLJ 253 by Abdul Hamid Mohamad FCJ (as he then was) when he stated (at p 116 (MLJ); p 278H (CLJ)):

> [45] The point to note here is that both courts, civil and shariah, are creatures of statutes. Both owe their existence to statutes, the Federal Constitution, the Acts of Parliament and the State Enactments. Both get their jurisdictions from statutes ie, constitution, federal law or state law, as the case may be. So, it is to the relevant statutes that they should look to determine whether they have jurisdiction or not. Even if the Shariah Court does not exist, the civil court will still have to look at the statutes to see whether it has jurisdiction over a matter or not. Similarly, even if the civil court does not exist, the Shariah Court will still have to look at the statute to see whether it has jurisdiction over a matter or not. *Each court must determine for itself first whether it has jurisdiction over a particular matter in the first place, in the case of the Shariah Courts in the states, by referring to the relevant state laws* and in the case of the Shariah Court in the Federal Territory, the relevant federal laws. (Emphasis added.)

The court will next have to look at what the Laws of Sarawak on what jurisdiction has been conferred to the Shariah Courts of Sarawak to the exclusion of this court.

(b) Shariah Courts Ordinance 2001 (Laws of Sarawak, Chapter 42)

Section 10(3)(b)(vii) and (ix)of the Syariah Courts Ordinance 2001 (Laws of Sarawak, Chapter 42) states:

> 10(3) The Syariah High Court shall —
>
> (b) in its civil jurisdiction, hear and determine all actions and proceedings if all the parties to the actions or proceedings are Muslims and the actions or proceeding relate to —
>
> (viii) division and inheritance of testate and intestate property;
>
> (ix) the determination of the persons entitled to share in the estate of a deceased Muslim or the shares to which such persons are respectively entitled;

Again it is clear to this court that s 10(3)(b)(vii) and (ix) of the Syariah Courts Ordinance 2001 confers the Shariah High Court of Sarawak with the express jurisdiction to hear and determine actions and proceedings relating to division, inheritance and the entitlement and share of a beneficiary in the estate of a deceased Muslim.

This means that this court does not have any jurisdiction on the issues on the division, inheritance and the entitlement and share of a beneficiary in the estate of a deceased Muslim.

Application of Shariah law: Estate matters

[29] The plaintiff's claim to be a beneficiary and inheritance rights to the deceased estate based on para 1 of the re-amended statement of claim is being challenged by paras 2, 4(15) and 5 of the first defendant's defence.

[30] The reliefs claimed in para 13(1)(b) and (2)(a) and (d) of the re-amended statement of claim is actually for the division, distribution of the inheritance and ascertaining the plaintiff as a beneficiary and her share entitlement as a beneficiary in the estate of the deceased. All these matters according to s 10(3)(b)(vii) and (ix) of the Syariah Courts Ordinance 2001 falls within the jurisdiction of the Shariah High Court of Sarawak. Since the Shariah High Court of Sarawak has been conferred jurisdiction over all Muslims on all matters pertaining to the division and inheritance of intestate property including who are beneficiaries and their share entitlement, this court has no jurisdiction on the matters raised in issue in this suit.

[31] This means that whether the plaintiff is a beneficiary of the estate and what is her share has to be submitted for the adjudication of the Shariah High Court of Sarawak and not within the purview of this court.

Subject matter approach

[32] Learned counsel for the plaintiff submitted that the declaratory orders sought against the defendants, one of whom is a non-Muslim pursuant to prayers (1), (b), (c) and (d) of the re-amended writ of summons and statement of claim are solely matters within the jurisdiction of the civil courts and the Shariah Courts have no jurisdiction or power to grant declarations, such as those sought in the instant case. In support, he cited the cases of *Majlis Agama Islam Pulau Pinang v Isa Abdul Rahman & Satu Yang Lain* [1992] 2 MLJ 244 ; [1992] 1 CLJ (Rep) 201 and *Barkath Ali bin Abu Backer v Anwar Kabir bin Abu Backer* [1997] 4 MLJ 389 which looked at the relief sought or 'remedy prayed for approach' to determine if the Shariah Court was vested with jurisdiction.

[33] Learned counsel for the defendants submitted that such approach of taking 'the remedy prayed for' is no longer the law because the courts now take the 'subject matter' approach or the 'implication approach' for considering the issue of jurisdiction, ie whether or not the subject matter is within the

competence of the state Legislature to enact in giving jurisdiction to the Shariah Courts. This 'subject matter' approach had been adopted in the cases of *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang dan satu tindalean liah* [1996] MLJU 500; [1996] 3 CLJ 231, *Abdul Shaik bin Md Ibrahim & Anor v Hussein Ibrahim & Ors* [1999] 5 MLJ 618; [1999] 3 CLJ 539 and *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily Shaik Natar & Ors* [2003] 3 MLJ 705; [2003] 3 CLJ 289 to avoid the undesirable effect of the remedy approach which fostered the tailoring or manipulating of the prayer for a remedy to be changed so as to take away the original jurisdiction of the Shariah Courts in favour of the civil court.

[34] According to *Shaik Zolkaffily bin Shaik Natar* Haidar Mohd Noor CJM in the Federal Court when affirming *Abdul Shaik bin Md Ibrahim*'s case and overruling *Isa Abdul Rahman*'s case had this to say (at p 712–713 (MLJ); p 300a (CLJ)):

> In *Abdul Shaik bin Md Ibrahim*, Abdul Hamid Mohamad J held that the case is not removed from the jurisdiction of the Shariah Court merely because the plaintiffs have prayed for the remedy of declarations. *His Lordship did not follow Isa Abdul Rahman but followed Soon Singh which adopted the 'subject matter' approach rather than the 'remedy prayed for' approach.* (Emphasis added.)

[35] The court is bound by the decision of the Federal Court in *Shaik Zolkaffily bin Shaik Natar*'s case, the fact that the plaintiff is seeking declaratory reliefs in para 13 of the re-amended statement of claim does not oust the Shariah High Court's jurisdiction and the court should apply the 'subject matter' approach in this suit to see whether the court has jurisdiction to give the reliefs prayed for by the plaintiff.

[36] Applying *Shaik Zolkaffily bin Shaik Natar*'s case and the 'subject matter' approach and contrary to learned counsel for the plaintiff's reply submission, the court will find that the plaintiff cannot establish that she is a beneficiary of the estate and for a share by this suit in this court by praying for them through the declaratory reliefs implicit from the granting of para 13(1) and (2) re-amended statement of claim in particular under para 13(1)(b) and (2)(a) and (d) thereof. These matters fall squarely within the jurisdiction of the Shariah High Court (see *Latifah Mat Zin*'s case at paras 54–56).

[37] The plaintiff's pleading in para 13(2)(a) and (d) of the re-amended statement of claim for distribution and payment in accordance with Islamic Muslim law of inheritance is a futile attempt to cloak this court with the jurisdiction which belongs to the Shariah High Court under s 10(3)(b)(vii) and (ix) of the Syariah Courts Ordinance 2001.

[38] The plaintiff has to establish herself as a beneficiary of the estate and her share entitlement through the Shariah High Court, as this court does not have jurisdiction to entertain this part of the claim in her suit. The court finds that this part of her claim for reliefs that are within the Shariah High Court's jurisdiction ought to be struck out from this suit under O 18 r 19 and O 92 r 4 of the RHC 1980.

Locus standi: Rest of the reliefs

[39] Now we come to deal with the rest of the plaintiff's claim for the reliefs in para 13(1) and (2) of the re-amended statement of claim against the defendants, inter alia, for declarations for administration, setting aside the charges, accountability for money received, and the other related reliefs including for the distribution of the estate which are not matters within the jurisdiction of the Shariah High Court. The court will find that the rest of the reliefs claimed by the plaintiff against the defendants which includes a non-Muslim are matters that falls squarely within the jurisdiction of this court.

[40] On the next step to take, the court is guided by the approach taken by Suriyadi Halim Omar J (as he then was) in *Daud Mamat*'s case:

> Before delving into the technical matters, I need to resolve a procedural or 'the sufficiency of interest' factor first. That being so, a perusal of the facts becomes exceedingly necessary.

[41] The court needs to ascertain the interest of the plaintiff and her entitlement to the rest of the reliefs claimed in the light of the earlier finding that the court has no jurisdiction to declare the plaintiff as a beneficiary of the estate. On the procedural aspect the court will refer to *Latifah Mat Zin*'s case where Abdul Hamid Mohamad FCJ stated:

> [49] Until the problem is solved by the legislature, it appears that the only way out now is, *if in a case in the civil court, an Islamic law issue arises, which is within the jurisdiction of the Shariah Court, the party raising the issue should file a case in the Shariah Court solely for the determination of that issue and the decision of the Shariah Court on that issue should then be applied by the civil court in the determination of the case.* (Emphasis added.)

[42] Applying this to the facts here, in the order of things, we find that the plaintiff claims that she is a beneficiary of the estate but has yet to file a case to establish this through the Shariah High Court. It is clear in such a case what the role and stand of this court is from the observation in *Kaliammal a/p Sinnasamy v Majlis Agama Islam Wilayah Persekutuan (Jawi) & Ors* [2012] 3 MLJ 694; [2011] 2 CLJ 165 by Abdul Wahab Patail JCA:

A

> [22] To our minds in a dual judicial system anywhere, there will always occur occasions when there appear to be dissonance between the two systems. The civil court seeks to resolve such dissonance where possible by applying an interpretation so that there is no conflict, or *to ensure that the grievances be first brought before the court of competent jurisdiction to consider a rule upon it.* It is not the proper course to reject the court of competent jurisdiction and instead go to the civil court. (Emphasis added.)

B

C

[43] If the plaintiff is not recognised yet by Shariah law as a beneficiary of the estate, a question immediately arises on 'the sufficiency of interest' or her locus standi or right to institute an action in this court over the administration of the estate against the first defendant as its duly appointed administrator and against the second defendant for taking the charges on the land from the estate.

D

[44] If the court accepts the submission of learned counsel for the plaintiff that the plaintiff can apply later to the Shariah Court after getting her declaratory orders here, we may end up with an untenable situation. What if the plaintiff succeeds in her claim to get the reliefs in this court against the defendants, but that the Shariah Court subsequently rules that she is not a beneficiary of the estate. In the meantime the orders made by this court against the defendants at the behest of a volunteer without any interest but with good intentions for the estate would amount to a wrongful interference with the legitimate rights of the defendants.

E

F

[45] The court will find that because the plaintiff has not been declared a beneficiary of the estate by the Shariah High Court, the rest of the reliefs prayed for in paras 13(1) and (2) of the re-amended statement of claim becomes premature by lack of locus standi. This accords with what Abdul Hamid Mohamad FCJ stated in *Latifah Mat Zin*'s case that after resolving the civil jurisdiction matters in the civil courts like getting out the letters of administration (for Sarawak from the probate office) or what properties are part of the estate that falls to be decided by civil law (at para 67):

G

H

> Once that is determined, and if it forms part of the estate of the deceased, then the Shariah Court should proceed to determine the portion to which each beneficiary is entitled to, according to 'faraid'. That order is then filed in the civil court, which will give effect to it. Of course, this is very cumbersome. But, that is the only way out under the current law.

I

[46] In the order of things, until such time the plaintiff can establish herself as a beneficiary before the Shariah High Court can this court have jurisdiction to entertain her claim against the defendants for the rest of the reliefs which are within the jurisdiction of this court.

[47] In *Latifah Mat Zin*'s case Abdul Hamid Mohamad FCJ had cause to lament on the state of the law resulting in multiplicity of action:

> [80] As a result, jurisdictional problems that had not been envisaged have arisen. Some require double proceedings, one in the civil court and another in the Shariah Court before a final decision may be made. This causes delay and incurs unnecessary expenses.

[48] The court finds that to suspend these proceedings while she applies to the Shariah Court to be declared a beneficiary is an option open to the court however this firstly will be sanctioning her attempt to apply wrongly to this court implicitly to be recognised or made a beneficiary through her declaratory orders thereby usurping jurisdiction; and secondly, under the circumstances in order not to litter the cause list with stayed proceedings, the court will prefer the neater solution to find that since the plaintiff's suit does not disclose a reasonable cause of action it should be struck out under O 18 r 19(1)(a) of the RHC 1980. It also becomes an abuse of process and under the inherent jurisdiction of the court (O 92 r 4 of the RHC 1980) it ought to be struck out.

CONCLUSION

[49] The court will answer the question posed under O 14A of the RHC 1980 by confirming that the court has no jurisdiction to decide whether the plaintiff, a Muslim is a beneficiary and what her share entitlement is in the estate of the intestate deceased, a Muslim which are matters within the jurisdiction of the Shariah High Court.

[50] In answering this question by declining jurisdiction because the plaintiff is not a beneficiary of the estate recognised by Shariah law or an interested party will lose her locus standi to sue the defendants for the rest of the reliefs prayed for in this suit. With the result that the plaintiff's suit does not disclose a reasonable cause of action or becomes an abuse of process.

[51] The court will strike out the plaintiff's action with costs to the defendants.

Plaintiff's action struck out with costs.

Reported by Kohila Nesan